Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:CTR:HAR:TL-N-2412-00
CJSantaniello
date: April 20, 2000

to: Chief, Examination Division, Connecticut-Rhode Island District
Attn: Case Manager [redacted], Group [redacted]

from: District Counsel, Connecticut-Rhode Island

ject: **Large Case Advisory Opinion - [redacted]**

THIS DOCUMENT INCLUDES CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE SERVICE, INCLUDING THE SUBJECT TAXPAYER. THIS DOCUMENT ALSO CONTAINS TAX RETURN INFORMATION SUBJECT TO THE PROVISIONS OF I.R.C. § 6103 AND ITS USE WITHIN THE SERVICE SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW IT.

We are responding to your February 17, 2000 memorandum, in which you requested legal advice regarding the certain language appearing on a Form 872 prepared by the taxpayer. For the reasons set forth below, the Service may not assess tax attributable to partnership items for the partnership's taxable year [redacted] without the taxpayer's consent. In this regard, because the limitations period for partnership adjustments has already expired for that year, there is no reason to expect that the taxpayer will provide such consent at this time. Furthermore, although the language appearing in the Form 872 prepared by the taxpayer neither benefits nor disadvantages the Service as to partnership items, it does extend the limitations period for [redacted] nonpartnership items. Consequently, we see no problems in your signing the Form 872 prepared by the taxpayer.

Issue

Whether the Service should execute the Form 872, prepared and submitted for signature by the taxpayer, which includes language that differs from the phraseology previously approved by the Service relating to extending the assessment period for tax attributable to partnership items. **U.I.L. No. 6229.02-00.**

Facts

During the examination of the taxpayer's [redacted] Form 1120, the Service requested that the taxpayer execute Form 872 containing the following language:

> Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see I.R.C. 6231(a)(3)), affected items (see I.R.C. § 6231(a)(5), computational adjustments (see I.R.C. § 6231(a)(6)), and partnership items converted to nonpartnership items (see I.R.C. § 6231(b). This agreement extends the period for filing a petition for adjustment under I.R.C. § 6228(b) but only if a timely request for administrative adjustment is filed under I.R.C. § 6227. For partnership items which have been converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under I.R.C. § 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph 2, above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership [The issuance of a notice of deficiency will not terminate this agreement under paragraphs (1) and/or (2) for the items described by this paragraph.]

This language appears in our memorandum dated October 21, 1999, in which we indicated that such language be included in all initial extensions and subsequent renewals. The Service has never examined the partnership's timely-filed [redacted] Form 1065, and the limitations period for that year expired on [redacted].

Recently, the taxpayer declined to sign the Form 872 containing the above language. According to the taxpayer, the Form 872 prepared by the Service unfairly discriminates against it by making it the only partner liable for tax attributable to potential adjustments to the yet-to-be-audited [redacted] partnership return. Specifically, the taxpayer maintains that because more than three years have elapsed since the filing of the partnership's [redacted] Form 1065, the Form 872 would enable the Service to examine the partnership return outside the three-year limitations period provided in I.R.C. § 6229(a) and ascribe the allocable adjustments to only the taxpayer, which the taxpayer finds unacceptable.

The taxpayer is not, however, unwilling to extend the limitations period for partnership items attributable to differences between partnership items reported on its Form 1120 and those appearing on the schedule K, known as "true-ups." To this end, the taxpayer has proposed the following alternative language for consideration:

> The Taxpayer and the Service hereby agree that any underpayment of tax by the taxpayer, by reason of failing to treat a partnership item attributable to a partnership in a manner which is consistent with the treatment of such partnership item on the partnership return, may be assessed and collected in the same manner as if such underpayment were on account of a mathematical or clerical error appearing on the taxpayer's (partner's) return for which the period of assessment of any federal income tax has been extended under paragraph (1), above. The Taxpayer and the Service further agree that the taxpayer may request abatement of assessment of mathematical or clerical error on the taxpayer's return. If there is an overpayment of tax by the taxpayer, by reason of the taxpayer failing to treat a partnership item in a manner which is consistent with the treatment of such partnership item on the partnership return, the taxpayer may file a claim for credit or refund in accordance with paragraphs (1) and (2), above.

The signed Form 872 containing the above language was received by the Service, but remains unsigned by the Service pending advice on this matter. The statute of limitations for the taxpayer's taxable year [redacted] will expire on [redacted].

Discussion

Section 6501(a) provides generally that, unless otherwise provided, the time within which an assessment must be made is three years from the later of the statutory due date for filing or the actual date of filing of the return. For purposes of section 6501(a), the "return" is the return filed by the partner/shareholder, rather then the information return filed by a flow through entity from which the taxpayer received the item of gain, loss, deduction, or credit in question. See Bufferd v. Commissioner, 506 U.S. 523, 533 (1993) (involving an S corporation items); Siben v. Commissioner, 930 F.2d 1034, 1035 (2d Cir.), cert. denied. 502 U.S. 963 (1991) (involving partnership items).

Although the TEFRA unified audit and litigation procedures for partnerships include a specific provision setting forth a minimum assessment period for adjustments attributable to partnership items (section 6229(a)), the enactment of TEFRA did not alter prior law. Conf. Rep. No. 97-248 at 600 (1982), 1982-2 C.B. 462. Thus, the triggering event for the assessment of tax against a taxpayer continues to be the filing of the taxpayer's individual return, not the information return of the flow-through entity from which the taxpayer received the item of gain, loss, deduction, or credit.

Since the enactment of TEFRA, specific provisions affecting the limitation on assessment have been enacted that are unique to TEFRA partnerships. First, section 6501(n)(2) provides a cross reference to section 6229, expressly providing that "[f]or an extension of period in the case of partnership items (as defined in section 6231(a)(3), see section 6229." Under section 6229(a), except as otherwise provided, the period for assessing any tax attributable to any partnership item (or affected item) for a partnership shall not expire before the date which is three years after the later of (i) the date on which the partnership return was filed, or (ii) the statutory due date (determined without regard to extension). Section 6229(a), therefore, provides for a minimum assessment period for adjustments attributable to partnership items.

Under section 6229(b), the assessment period for partnership items prescribed in section 6229(a) may be extended at either the partner or partnership levels. Section 6229(b)(1)(A) provides that the assessment period may be extended with respect to any partner by an agreement entered into by the partner and the Secretary. Such an agreement would extend the assessment period for partnership items only against the individual partner. Similarly, section 6229(b)(1)(B) provides that the assessment period may be extended with respect to all partners by an agreement entered into by the Secretary and the Tax Matters Partner. An agreement under subsection (b)(1)(B) is binding on all of the partners. Section 6629(b)(3) provides that any agreement under section 6501(c)(4) shall apply with respect to the period described in section 6229(a) only if the agreement expressly provides that such agreement applies to tax attributable to partnership items.

In this case, the Service has neither examined the partnership's [redacted] return nor secured a statute extension for that year under section 6629(b)(1)(B). Consequently, unless the taxpayer agrees to individually extend the limitations period for partnership items (or affected items) under section 6229(b)(1)(A), the period for assessing tax attributable to those items for that year expired on [redacted] (three years from the due date of the partnership's timely-filed Form 1065). Furthermore, because the limitations period for partnership items has already expired, it is unrealistic to expect that the taxpayer would willingly extend the limitations period for such items at this time. In fact, the taxpayer has expressly refused to do so, having rejected the language in the Form 872 proposed by the Service.

As previously noted, the taxpayer has executed a Form 872 for [redacted] containing language regarding certain partnership adjustments. Due to the interplay between sections 6501 and 6229, you have solicited our advice regarding whether to execute the Form 872 in its present form.

Regarding nonpartnership items, the Form 872 will validly extend the limitations period for the taxpayer's [redacted] taxable year, which would otherwise expire on [redacted].

Regarding the assessment of partnership items, however, the language appearing in the Form 872 neither benefits nor disadvantages the Service regarding the assessment of partnership items. Specifically, the Form 872 does not permit the Service to adjust the taxpayer's [redacted] taxable income by all partnership adjustments, as provided in the Form 872 initially proposed by the Service. In its present state, the Form 872 merely enables the Service to make "true up" adjustments attributable to the taxpayer's failure to treat a partnership item in a manner inconsistent with its treatment on the partnership return. This language does not, however, authorize the Service to take any action that it could not otherwise take under sections 6222(a) and (b) and is, therefore, superfluous. Because the Service is not prejudiced in any way by this language, we do not foresee any problems associated with your executing the Form 872 prepared by the taxpayer.

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if necessary, we will send you a supplemental memorandum incorporating any such recommendation.

Since there is no further action required by this office, we are closing our file in this matter. Please call Carmino J. Santaniello at (860) 290-4075 if you have any questions or require further assistance.

BRADFORD A. JOHNSON
Acting District Counsel

By: _____
CARMINO J. SANTANIELLO
Attorney